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February 3, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Bv Hand**

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: Docket Nos. 02-277, 01-235, 01-317 and 00-244

Dear Secretary Dortch:

While the Coalition for Program Diversity's (CPD) Reply Comments were timely filed electronically this morning (stamped receipt filing attached), we are submitting the hard copy version of the CPD's Reply Comments and requesting that these Comments be re-scanned into the FCC's Record in this proceeding. Our request that CPD's Reply Comments be scanned once more in the FCC's Record is due to an apparent computer glitch adversely impacting the filing already on Record at the Commission and available to the public through the FCC's webpage

Please contact the undersigned should you have any questions.

Sincerely,

Michael R. Gardner

Michael R. Gardner
Counsel for the Coalition for Program Diversity

Enclosure

cc: William Caton

Federal Communications Commission

The FCC Acknowledges Receipt of Comments From ...
Coalition for Program Diversity
...and Thank You for Your Comments

**Your Confirmation Number is: '200323903877 '**

**Date Received:** Feb 3 2003

**Docket:** 02-277

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Secretary
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445 12th Street, S.W.
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Re: Docket Nos 02-277, 01-235, 01-317 and 00-244

Dear Secretary Dortch:

On behalf of the Coalition for Program Diversity (CPD), enclosed please find CPD's Reply Comments in this proceeding.

Please direct any questions regarding this matter to the undersigned

Sincerely,

M R. Gardner

The Law Offices of Michael R. Gardner, P.C.

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cc: Chairman Michael Powell
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Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Susan Eid
Stacy Robinson
Jordan Goldstein
Alex Johns
Catherine Bohiyian
Sarah Whitesell
Ken Ferree
Jane Mago
Paul Gallant

**Before the**
**Federal Communications Commission**
**Washington, D.C.**

In the Matter of

| | |
|---|---|
| 2002 Biennial Regulatory Review | ) MB Docket No.02-277 |
| | ) |
| Cross-Ownership of Broadcast Stations and Newspapers | ) MM Docket No.01-235 |
| | ) |
| Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets | ) MM Docket No.01-317 |
| | ) |
| | ) |
| Definition of Radio Markets | ) MM Docket No.00-244 |

# REPLY COMMENTS BY THE COALITION FOR PROGRAM DIVERSITY

Submitted by:

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February 3,2003

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**Summary**

The Coalition for Program Diversity[1] has documented the fact that the four major networks collectively exercise a diversity-chilling stranglehold over the narrow pnme time television programming marketplace.

Unregulated, the networks have savaged the once robust independent producer community that, during the Golden Age of Television, provided 100% of the networks prime time programming. In the 1970s and 1980s, when the three networks were subject to content-neutral regulations, the networks' prime time schedules consisted totally of independently produced programming that routinely included sitcoms. dramas. and movies of the week.

Today, the unregulated networks are fixated on maximizing profits for their corporate parents. Reality programming targeted for youthful demographic audiences has become the preferred form of low budget network programming. In this unregulated environment, the Commission's goals of promoting diversity and competition are being trumped by the networks' obsession with increased profit margins.

Importantly, there are more than 43 million Americans who do not have programming available on cable or satellite services and are therefore completely dependent on advertiser supported relevision. The diversity and quality of programming on the networks' prime time schedule is particularly important to these consumers whose average median income is nearly 50% less than rhe median income of $51,375 for Cable **and** Satellite Households.

[1] The Coalition for Program Diversity includes:

- American Federation of Television and Radio Artists (AFTRA), New York, ***NY;***
- Carsey-Werner-Mandabach, LLC, Los Angeles, **CA;**
- Direcrors Guild of America (DGA), Los Angeles, CA;
- Marian Rees Associates, Inc., Studio City, CA;
- MediaCom, New York, ***NY;***
- Screen Actors Guild of America (SAG), Los Angeles, CA;
- Sony Pictures Television, Culver City, CA;
- Stephen J. Cannell Productions, Los Angeles, CA.

For the U.S. advertising industry - the essential economic engine that sustains free network television for American viewers - homogenized network programming means less audience reach. higher ad prices, and ultimately higher product costs for U.S. consumers. Huge "numbers" from reality shows may make network officials "ecstatic" hut those numbers do nothing to promote diverse genres of programming for all age groups.

Those who argue that the Internet provides consumers and advertisers an alternative to network television are wrong. There is no proven substitutable programming for prime time network television and the audience draw it represents for advertisers. That point has been dramatically demonstrated as national advertisers rejected the Internet hype and the Internet bubble burst.

The 25% Independent Producer Rule is a modest. easy to apply, yet vital. carve out that will insure that the American public will have access to diverse non-network owned programming at least 25% *of* the time. The <u>Schurz</u> Court. the <u>Turner</u> Court, and the <u>O'Brien</u> Court all sanction the Commission's efforts to promote program diversity - and the <u>Schurz</u> Court even explicitly blesses a content-neutral "carve out" that "might" increase sources of program diversity.

If adopted. the 25% Independent Producer Rule will create a window of opportunity for countless women and men from the creative community to compete to air their diverse programming on *250'0* (approximately 4-5 hours a week) on the four networks' prime time schedules. Indeed the most profitable major network today now airs well in excess of 25% independently produced programming, CPD data demonstrates.

Even with the Commission's adoption of the 25% Independent Producer Rule, the networks will retain 100% *of* the ad revenues from their entire prime time schedule. In addition, the networks can own and produce 75% of the prime time programs aired each week.

For the U.S. advertising industry, for the U.S. creative community, and for U.S. television viewers — especially the 43 million network-only viewers — the 25% Independent Producer Rule is essential if diversity is to remain a credible and viable goal of the FCC.

**Before the**
**Federal Communications Commission**
**Washington. D.C.**

In the matter of

| | |
|---|---|
| 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of I996 | ) MB Docket No.02-277 |
| Cross-Ownership of Broadcast Stations and Newspapers | ) MM Docket No.01-235 |
| Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets | ) MM Docket No.01-317 |
| Definition of Radio Markets | ) MM Docket No.00-244 |

To: The Commission

**REPLY COMMENTS OF THE COALITION FOR PROGRAM DIVERSITY**

## I. INTRODUCTION

Rarely, if ever, in the history of the Commission's regulation of the networks has a major U.S. advertiser joined forces with leaders of the Hollywood creative community — including three major Guilds — to petition the Commission to impose a new regulation on the four major networks. From a business perspective, people who do business with the four major networks should not publicly attack current network programming practices.

But that is exactly what has occurred with formation of the Coalition for Program Diversity. MediaCom, the world's ninth largest advertising agency, has publicly joined with leaders of the Director's Guild of America (DGA), the Screen Actors Guild (SAG), and the American Federation of Television and Radio Artists (AFTRA) to petition the Commission to take content-neutral action to increase the sources of diverse programming on the networks' **prime** time television schedules.

Also joining this Coalition's effort are four of Hollywood's most respected independent producers: Carsey-Werner-Mandabach; Marian Rees Associates; Sony Pictures Television (previously Columbia-Tri Star) and Stephen J. Cannell Productions.

The diverse members of the Coalition for Program Diversity share one common goal: they want the American viewing public to have access to diverse quality prime time programming on the free spectrum licensed by the Commission to the four major networks. To achieve this goal, the Coalition has proposed the content-neutral 25% Independent Producer Rule.

Mindful that the Commission must have a solid record before it in order to regulate in a judicially sustainable manner to promote the Commission's bedrock goal of program diversity, members of the Coalition for Program Diversity have provided irrefutable documentation in the FCC's record of the dramatically diminished sources of diverse programming that has occurred during the past decade due to deregulation and the resulting massive media consolidation.

The following Reply Comments. read collectively with the CPD's January 2 comments and other comments provided in the record of this proceeding, provide abundant and compelling evidence that the current network prime time television programming marketplace is dysfunctional from a diversity standpoint. For more than 43 million U.S. consumers who only watch network television[1] – and for the public at large – rhe Commission now has the record and the opportunity to act to promote its overarching goals of robust diversity and competition in the narrow but vital prime time television programming marketplace.

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[1] See MEDIAMARK RESEARCH. INC., FALL 2002 REPORT (2002), Copyright 2002

## II. THE RECORD BEFORE THE COMMISSION CONFIRMS THE DYSFUNCTIONAL NATURE OF THE NETWORK DOMINATED PRIME TIME TELEVISION PROGRAMMING MARKETPLACE

In this Omnibus Broadcast Rulemaking proceeding, the Commission often is confronted with a voluminous record of conflicting assertions. But that is not the case in regard *to* the narrow, but critically important prime time television programming marketplace. It is dysfunctional and unable, when left *to* marketplace forces alone, to promote the Commission's fundamental goals of diversity and competition

**As** documented in these Comments and the CPD's initial Comments tiled on January 2, 2003, the irrefutable record now before the Commission confirms that:

(1) Today, the prime time television programming marketplace is overwhelmingly dominated **by** the four major networks who currently control, through various forms of ownership, 76.1% of the shows available to American viewers on advertiser supported prime time television.' Importantly from a public policy perspective, more than 43 million Americans do not have cable or satellite delivery systems and are, therefore, totally dependent on the prime time programming aired by over-the-air stations, principally the four major networks.[3]

(2) During the past 10 years – when the four major networks were freed of any regulatory responsibility to promote the Commission's goals of program diversity – the sources for prime time television programming have dramatically diminished due to the networks' anti-competitive stranglehold over their prime time schedules. Independent producers, who

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[2] See **Appendix** at 19 (Coalition for Program Diversity Study (hereinafter CPD **Study**), ***2002-2003 Network Primetime Program Ownership(Excludes Theatricals/MOWs)***), Jan. 28,2003 (information compiled from THE HOLLYWOOD **REPORTER,** Primetime Network Schedule 2002-2003: Guide *to* the 2002-2003 Television Season (Oct. 2002)).

[3] See MEDIAMARK **RESEARCH,** INC., FALL 2002 **REPORT** (2002), Copyright 2002.

owned 46.5 hours of diverse prime time programming on the networks' weekly prime time schedule just ten years ago,[4] owned only 17 hours of the networks' weekly prime time schedule at the beginning of the current (2002 - 2003) broadcast season.[5]

(3) In 1992. 66.4% of the networks' prime time schedule consisted of diverse programs – including dramas, sitcoms, news programs, sports, action dramas, movies of the week – produced and owned by independent producers.[6] Today only 24% of the network's collective prime time schedule is produced by independent producers.[7]

(4) Today, only five independent producers had their series programming aired in 2002 on the networks' prime time schedules.[8] By contrast, in 1985, 26 independent producers programmed most of the networks' prime time schedules – diverse schedules that included sitcoms, dramas and movies of the week.[9]

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[4] See Appendix at 9 (CPD Study, *1992-1993 Network Primetime Program Ownership (Excludes Theatricals/MOWs)*, Jan. 28, 2003 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season (Sept. 1992)).

[5] See Appendix at 19 (CPD Study, *2002-2003 Network Primerime Program Ownership (Excludes Theatricals/MOWs)*, Jan. 28.2003 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 2002-2003: Guide to the 2002-2003 Television Season (Oct. 2002)).

[6] See Appendix at 9.

[7] See Appendix at 6 (CPD Study, *2002-2003 TV Season Network Primetime Program Ownership (ABC, CBS, Fox, NBC)*, Jan. 28,2003 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 2002-2003: Guide to the 2002-2003 Television Season (Oct. 2002)).

[8] See Appendix at 2 (CPD Study, *Network Primetime INDEPENDENT TELEVISION PRODUCERS*, Jan. 28,2003 (information compiled from THE HOLLYWOOD REPORTER, Primerime Network Schedule 2002-2003: Guide to the 2002-2003 Television Season (Oct. 2002); THE HOLLYWOOD REPORTER, Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season (Sept. 1992); THE HOLLYWOOD REPORTER, 1990-1991 TV Preview (Sepr. 1990); TV Guide @ 50, 1985 Primetime Lineup available at http://www.tvguide.com/50th/timecapsule/whatwason/1985/asp (last visited Feb. 3, 2003).

[9] See id.

These statistics are irrefutable: they are also compelling because they document the reality of today's dysfunctional, network dominated prime time television programming marketplace. Unregulated, the networks' diversity-chilling tactics have caused most independent sources of prime time programming to shut down. And with the current media consolidation and the inevitable increased consolidation resulting from any further deregulation of the four networks, the few endangered species of true U.S. independent producers will quickly become relics of a once vibrant and fiercely competitive independent producer community.

With this further shrinkage of independent sources of prime time programming, the American viewing public will continue to be relegated to the least expensive, least socially-provocative programming that four – and only four – network executives decide to air on their prime time schedules. In the process, diversity – both of sources and programs – will be further diminished as the four networks continue to fixate on bottom line profits by simultaneously rerunning ("repurposing") their in-house owned programming on every eligible network owned cable and broadcast platform." As a result of the networks overloading their prime time schedules with inexpensive "reality" programming and other low budget programming, the American viewing public will continue to have less diverse programming options on free, advertising supported television. Importantly, from the Commission's perspective, its goals of promoting competition and a diversity of program sources in the prime time television programming marketplace will be further compromised.

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[10] See Proeram Diversity and The Proeram Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity, at 2 (Sept. 2002). Each of the major networks has affiliated entities which own general entertainment cable networks (e.g., BRAVO, TNN, ABC, Family, FX, etc.). See generally id.

For the U.S. advertising industry – the essential economic engine for free over-the-air network television – the continued blandness and repetiveness of the networks' prime time schedule represents a serious problem. As the CPD's January 2 Comments demonstrate, a critical nexus exists between diversity of prime time television programming and maximum advertiser support for free broadcast television. Unfortunately, as the CPD's Comments confirm, when the networks are left unregulated and have no content-neutral diversity promoting requirement, they can air the lowest budget prime time programming; predictably the blandness and sameness of that programming attracts smaller audience shares – and that in turn, forces the broadcast advertiser to pay more for less audience outreach. Ultimately – this nexus results in a double negative for both the advertising industry and consumers.

As detailed in Section III of the CPD's initial Comments filed on January 2, advertisers basically fund free over-the-air television. Advertisers provide their enormous financial support for prime time network television because prime time network television is the most reliable nationwide vehicle to reach the various audience demographics that advertisers must have to introduce new products and sustain public awareness of standard products. The Internet – misguidedly viewed as the diversity panacea by some network advocates – does not offer advertisers an alternative to network prime time television. As Madison Avenue executives have demonstrated, the networks' nationwide audience reach is the uniquely equipped vehicle for advertisers to showcase their clients' products.

But despite this critical nexus between diverse network programming and the U.S. advertising industry – a nexus that is vital to the Commission's goal for the continued financial strength of free television – the networks are no longer required to provide diverse programming on their pnme time schedules. Today. unregulated. the four major networks do not seek the best, diverse programming in the traditional sense. Instead, the networks are fixated on generating the largest possible profit margins from all airings (and repeated airings) ofnetwork owned **or co-owned** programming on the networks' multiple video outlets, whether broadcast or cable."

Even before the current network mania for inexpensive reality programming occurred, respected industry leaders like David Barrett, CEO of Hearst-Argyle Television said "the networks are overprogramming their schedules. There is too much duplication."[12] **And** as noted in Schurz Communications v. **FCC** by one of the nation's foremost antitrust scholars, Judge Richard Allen Posner. "reruns are the antithesis of diversity."[13]

Based on the Record now before it, the Commission must accept the documenred reality that their licensees – the four major networks – simply have little incentive or regulatory pressure to seek to promote the Commission's goal (and the public's desire) for diverse, quality prime time television programming. Left unregulated for the past decade, the public companies owning the four major networks have become fixated on profits to the exclusion of the Commission's overarching goals of diversity, competition and localism

## III. THE CONTENT-NEUTRAL REGULATORY REMEDY: THE 25% INDEPENDENT PRODUCER RULE

As previously outlined in the CPD's January 2, 2003 Comments, the content-neutral **25%** Independent Producer Rule would carve out 25% of the networks' prime time television schedule

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[11] See Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity, at 16 (Sept. 2002).
[12] Dan Trigoboff, Barren: Less Could Be More, Broadcasting and Cable, Dec. 2,2002, § D2, at 2.
[13] Schurz Communications, Inc. v. Federal Communications Commission, 982 F.2d 1043, 1055 (7th Cir. **1992).**

for the airing of non-network. independently produced programming. The balance of the networks' prime time schedule would remain under the networks total control, allowing each of the four major networks to own and produce 75% of their prime time schedules. In addition, the four major networks would continue to enjoy 100% of the advertiser-generated revenues from their entire prime time schedules.

For the purpose of this self-policing rule, the following definitions and terms apply:

(A) A major network (which now includes ABC, CBS, FBC (hereinafter "Fox") and **NBC)** is an over-the-air network with 95% or more NTI <u>and</u> with greater than a 4.0 Household Rating.

(B) An independent producer is an entity other than one affiliated with **a** major network.

(C) The category of "25%" independently produced programming is computed on a semi-annual basis. Exhibition of motion pictures initially theatrically released which then air on the network are excluded from the computation. Thus, if a major network regularly scheduled hvo hours a week on its prime time schedule for viewing theatrical motion pictures, as described above, the denominator for applying the 25% Independent Producer Rule would be 20 hours, rather than the standard 22 hours which typically constitutes a major network's prime time schedule. (only 15 hours is the norm for Fox).

(D) The "75%" network programming includes a major network's in-house or network affiliated programming and programming from owners of other major networks.

(E) To qualify for the 25% carve out, a major network could not take a financial interest or domestic syndication rights in any independent produced programming.

(F) The "Term" or a "license period " for the networks' licensing of independent produced programming could not exceed six full seasons (plus a "half" season in the event of a winter start).

(G) The *25%* Independent Producer Rule would be gradually implemented over a two year period **(24** months) from the date of the Commission's adoption of the *25%* Independent Producer Rule.

Because of the volume and transparency of data available through numerous industry publications focusing on the narrow network prime time television programming marketplace, the content-neutral 25% Independent Producer Rule would be a largely self-policing, and therefore, **a** regulatory-efficient rule. For instance. each season, the major networks. in announcing their fall or spring schedules, could be expected to announce (as they do now) those prime time programs produced by independent producers, as defined above.

Regarding enforceability, the entire programming industry - Guilds, independent studios, small "one person" independent producer shops - would know if the 25% Independent Producer Rule **was** breached. The public also would know which network prime time shows were developed by outside. non-network sources. Importantly, these new sources of diverse programming would directly advance the Commission's frequently restated goal of promoting competition and diversity in the narrow network dominated prime time television programming marketplace.

## IV. THE JUDICIAL SUSTAINABILITY OF THE 25% INDEPENDENT PRODUCER RULE

### A. Court Precedent in Support of the 25% Independent Producer Rule

The Commission's duty to foster and promote diversity, cornpetition and localism on the public broadcast airwaves remains paramount despite continued diversity-chilling efforts by the major networks who seek to protect and expand their unregulated control of what American consumers watch on network television. In this era of documented anti-competitive media consolidation, the Federal Courts have repeatedly endorsed the Commission's goals for and efforts to promote diversity.[14] The Commission has been afforded significant flexibility by Congress[15] and by the courts, to act when diversity, competition and localism are in danger of being diminished by unregulated marketplace forces.[16] By adopting the 25% Independent Producer Rule, the Commission would be acting well within its judicially sanctioned jurisdiction *to* ensure that the 43,411,000 American consumers who rely on advertiser supported, network television benefit from more – not less - diverse sources of prime time programming.[17]

The record before the Commission is clear: network deregulation has and **will** continue to harm the 43 million American consumers who necessarily rely on the Commission to act on their behalf in promoting program diversity. By the Commission's own finding in its Program Diversity and the Program Selection Process on Broadcast Network study ("Study 5"), prime time network controlled television programming is bland,[18] and this blandness exists in large measure because the vast majority – 76.1% - of programs aired on the four major networks' prime time schedule are produced and owned (and thereby controlled) in some fashion by the networks."

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[14] See id. at 1049, 1050, 1054; see also Fox Television Stations. Inc. v. Federal Communications Commission, 280 F.3d 1027, 1042 (D.C. Cir. 2002) ("In the context of the regulation of broadcasting, 'the public interest' has historically embraced diversity (as well as localism), see FCC v. Nat. Citizens Comm. For Broad., 436 U.S. 775, 795 (1978), and nothing in § 202(h) signals a departure from that historic scope.").
[15] See Telecommunications Act of 1996, Pub. L. No. 1-4-104 (1996) § 202(h).
[16] See Schurz, 982 F.2d at 1049.
[17] See MEDIAMARK RESEARCH, INC., FALL 2002 REPORT (2002), Copyright 2002.
[18] See Program Diversity and the Program Selection Processon Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity, at 45 (Sept. 2002).
[19] See Appendix at 19.

A decade ago, when the Seventh Circuit in Schurz nullified the FinSyn regulation, it did so largely because the FCC had no record to demonstrate that the then vital, but now almost extinct, independent producer community would be savaged by the unregulated, anti-competitive post FinSyn conduct of the major networks.[20] At that time, diverse independently produced programming dominated the networks' prime time schedule, providing 66.4% of the programming.” Without the benefit of today's record confirming the resulting diminished sources of program diversity, the Schurz Court repealed FinSyn primarily because the record at that time did not contain sufficient evidence of harm to the public interest from the networks' “octopus-like”[22] stranglehold over the advertiser supported prime time network television programming.

Notwithstanding the absence of this proof in 1992 FCC record, the Schurz Court recognized the potential diversity diminishing impact of further network deregulation stating that “by discouraging the entry of new producers into the high-risk prime-time entertainment market, they [the networks] are likely to reduce the supply of programs to the independent stations and so reduce diversity of both program sources and of program outlets.”*’

The court also focused on the networks' claims that “monopoly in broadcasting could actually promote rather than retard programming diversity,”[24] and speculated that further deregulation could create a different scenario than the networks wish to reveal.[25] The Seventh

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[20] See Schurz, 982 F.2d at 1055.
[21] See Appendix at 9.
[22] Id. at 1046.
[23] Id. at 1051.
[24] Id. at 1054.
[25] See id.

Circuit suggested. “Each prime-time slot would be filled with ‘popular’ programming targeted on the median viewer, and minority tastes would go unserved. Some critics of television believe that this is a fair description of prime-time network television. Each network vies to put the most popular programs and as a result minority tastes are ill served.”[26] Ironically, a decade ago the Seventh Circuit’s clairvoyance accurately described the ultimate result of network deregulation that unleashed the brazen tactics currently utilized by the unregulated networks.

Regarding the sustainability of the CPD’s proposal for a 25% Independent Producer Rule, it is highly relevant that the Schurz Court in 1992 chose the word “might” and not “will” or “probably would result in” more program diversity, when the Court explicitly sanctioned the concept of a diversity-promoting FCC carve out of the networks’ prime time schedule:

> Even if we were persuaded that it would be irrational to impute to the networks even a smidgen of market power. the Commission could always take the position that it should carve out a portion of the production and distribution market and protect them against the competition of the networks in order to foster, albeit at a higher cost to advertisers and ultimately to consumers, a diversity of programming sources and outlets that might result in a greater variety of perspectives and imagined forms of life than the free market would provide. That could be a judgment with the Commission’s power to make.”

**“Might”** is the controlling standard in the Schurz Court’s judicial green light allowing the Commission, based on the record, to adopt an independent producer carve out in the networks’ prime time schedule. Importantly, the Schurz Court did not limit their support of a carve out to the situation where the Commission had an absolute guarantee of increased sources of diversity resulting from that *carve* out. To the contrary, the Schurz Court ruled that a carve out would be permissible

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[26] Id. at **1054-55**

[27] Id. at 1049.

even when the Commission merely concluded that the independent producer carve out "might" result in increased sources of diverse programming for the public."

Network advocates consistently argue that independent producers always have recourse to antitrust litigation. However, even renown anti-trust authority Judge Richard Posner, in Schurz, suggested that the Commission's efforts to promote diversity of the programming sources had to reach beyond mere antitrust considerations. "Anyway, the Commission's concern, acknowledged to be legitimate, is not just with market power in an antitrust sense but with diversity, and diversity is promoted by measures to assure a critical mass of outside producers and independent stations."[29]

Here, Judge Posner confirms the legitimacy of the Commission taking regulatory actions beyond the scope of traditional federal antitrust review by other federal entities, in order to promote program diversity. In this regard, the Schurz Court acknowledged that the FCC's goal ofpromoting programming diversity may require FCC action, including the adoption of a content-neutral independent producer carve out from the network's prime time schedule."'

Several additional Court rulings have provided further important support for the Commission's adoption on a content-neutral rule to promote diversity. In another relevant ruling, the United States Supreme Court, in the 1997 Turner Broadcastine v. Federal Communications Commission (hereinafter "Turner II"), reiterated the Courts' earlier holding regarding the sustainability of a content-neutral regulation that the Commission determines will further an important governmental interest."

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[28] See id.
[29] Id. at 1050.
[30] See id. at 1049.
[31] See Turner Broadcasting Svstem. Inc. v. Federal Communications Commission, 520 U.S. 180 (1997) ("Turner II") (affirming Turner Broadcastine Svstem. Inc. v. FCC, 512 U.S. 622 (1994) ('Turner I").

Moreover, Turner II reaffirmed the Court's 1994 holding, explicitly stating, "We have been most explicit in holding that "'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems" is an important federal interest.'[32] ... Despite the growing importance of cable television and alternative technologies, '"broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.". .. We have identified a corresponding 'governmental purpose of the highest order' in ensuring public access to 'a multiplicity of information sources.'"[34]

The Court's ruling in Untied States v. O'Brien is also relevant to the sustainability of the 25% Independent Producer Rule." In O'Brien, the Court explicitly sanctions the Commission's efforts "promoting the widespread dissemination of information from a multiplicity of sources."[36]

The Schurz Court, the Turner Court and the O'Brien Court provide the Commission ample judicial support for the sustainability of a content-neutral independent producer carve out to promote its goal of diversity of program sources.

When considering the 25% Independent Producer Rule. the Commission should recall the insightful words of Judge Posner when he stated that, "reruns are the antithesis of diversity."" Unfortunately, the Judge was prescient as reruns (or repurposing) of lowest budget network owned programming may become the sad hallmark of today's unregulated network prime time television programming marketplace.

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[32] Id. at 190 (citing Turner I, 512 U.S. at 663) (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691,714 (1984)).

[33] Id. (quoting Turner I, 512 US. at 663) (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968)).

[34] Id. (quoting Turner I, 512 U.S. at 663).

[35] See United States v. O'Brien, 391 U.S. 367 (1968).

[36] See Turner II, 520 U.S. at 189-190.

[37] Schurz, 982 F.2d at 1055.

Adoption of the content-neutral 25% Independent Producer Rule is sustainable. **Importantly,** it would promote diversity, benefit those viewers without pay services now held captive by the networks' bland prime time programming schedule, and ultimately create a welcome, new degree of diversity in prime time programming marketplace.

## B. The Coalition for Program Diversity's Standing and Standard of Review

Pursuant to the Administrative Procedures Act, following the issuance of a notice of proposed rule making, "Each agency shall give an interested person the right *to* petition for the issuance, amendment, or repeal of a rule."[38] "After notice of proposed rulemaking is issued, the Commission will afford interested persons an opportunity to participate in the rulemaking proceeding through the submission of written data. views, or arguments, with or without opportunity to present the same orally in any manner."" Moreover, the judicial system gives agency action deference unless the agency actions "are arbitrary, capricious, or manifestly contrary to the statute."“

The Commission's Notice of Proposed Rulemaking released September 12,2002 "seek[s] comment on several aspects of diversity."[41] **The** NPRM states "Program diversityrefers to a variety of programming **formats** and **content.**"[42] The Commission additionally seeks comments on "What has been the effect of this proliferation of new media outlets in the Commission's diversity goals?"[43] "Commentators are encouraged to submit empirical data and analysis demonstrating both change

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38 5 U.S.C.A. § 553(e) (1996).

39 47 C.F.R. § 1.415.

40 Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837,844 (1984) (see also United States v. Morton, 467 U S . 822,834 (19~~84); Schweiker v. Grey Panthers~~, 453 U S 34, 44 (1981); Batterton v. Francis, 432 U.S. 416,424-26 (1977).

41 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted **Pursuant** to Section 202 of the Telecommunication Act of 1996, Notice of Proposed Rulemaking, MB Docket No. 02-277, ¶ 40 (proposed Sept. 23,2002).

42 Id. at ¶ 38.

43 Id. at ¶ 42.

(either decrease or increase) in diversity levels and the causal link, as opposed to mere comelation, between those changes and greater consolidation in local markets."[44]

The Commission in its NPRM invited comments specifically addressing program diversity. The NPRM noted that "If we are to maintain ownership limits predicated on preserving diversity, we must inquire into whether our traditional theory of diffused ownership policy is in fact more likely to preserve diversity than a policy that relies on market forces or other measures to foster diversity."[45] The Commission also seeks "comment on whether we should promulgate behavioral requirements?"[46]

The NPRM specifically solicits comment regarding the need for broadcast regulations to foster and promote diversity, like the need to adopt the 25% Independent Producer Rule proposed by the CPD. The NPRM states, "Absent a rule, would market forces alone lead to increasedprogram diversity on commonly-owned stations?"[47] The CPD believes that absent a ***25%*** Independent Producer Rule, program diversity from non-network independent producer sources would become non-existent on the prime time television schedules of the four major networks.

Pursuant to the NPRM's request for "comment on whether, and if so how, the increased competition that television stations face from cable networks and other media affects the diversity of programming in all national program networks,"[48] the CPD has responded by providing the Commission with hard empirical data confirming the severe diminishment of diverse programming

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[44] Id. at ¶ **43.**
[45] Id. at ¶ **44.**
[46] Id. at ¶ 49.
[47] Id. at ¶ 83.
[48] Id. at ¶ 160.

sources in the narrow, prime time television marketplace. The NPRM also seeks "comment on the significance of this data to our biennial review of the ownership tules as well as any other competitive data that would be useful to our analysis."[49] In light of the magnitude of the Commission's Omnibus Rulemaking, the NPRM recognized the need to "consider whether there are additional objectives that the Commission should strive to achieve through our media ownership rules."[50] Recognizing that a decision regarding these rules could, and will according to the CPD, impact other areas of the broadcast marketplace, the Commission stated that its objective in this Omnibus Rulemaking is "to consider these rules collectively, as any change to one rule may affect the need for other rules to be retained. modified: or eliminated."[51]

In addition to seeking comment on promoting and maintaining Commission goals of diversity, competition and localism,'' the Commission also seeks comment on evaluating the inter-relatedness of advertising interests in the current media marketplace." The CPD offers first hand experience from the advertising industry regarding the adverse impact to advertisers and consumers if the Commission relaxes the 35% national broadcast cap, thereby triggering further consolidation in the network prime time television programming marketplace.

The Commission's stated "The goal of this proceeding is to solicit comment on the modification of the subject policies and rules,"[54] and "The Commission believes that a broad range

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49 Id. at ¶ 23.
50 Id. at ¶ 5.
51 Id. at ¶ 8.
52 See id. at ¶ 29.
53 See id. at ¶ 59.
54 Id. at Appendix A, § A, p. 56.

of comments must be received to ensure we fulfill our mandate to further the public interest, convenience and necessity."[55]

Moreover, in Commissioner Copps statement concurring with the NPRM, he specifically stated "I also want to emphasize that commentators should not feel they have to limit themselves to the questions posed in this item. The Commission labors under no illusion that we have asked every possible question; indeed, we may have overlooked some that cry out for response, so I urge those who respond to look at every aspect of these issues that you deem relevant to our decision-making process."[56]

The CPD submits that its Comments are timely and vitally important in view of the effect that any deregulatory decision made by the Commission will have on Coalition members and the millions of television viewers who seek diverse sources for prime time television programming. The CPD, consistent with the Commission's request to provide solutions to promoting the Commission's diversity goals, has designed the 25% Independent Producer Rule to advance the Commission's mandate to "retain or modify its media ownership regulations, in its biennial review, to be based on a solid factual record and a consistent analytical framework."[57] Based on the solid record now before the Commission, the CPD believes that adoption of the *25%* Independent Producer Rule is timely and necessary to achieve the Commission's diversity mandate.

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[55] Id.
[56] Id. at 64.
[57] Id. at ¶ 3.

## V. THE PUBLIC INTEREST: THE PUBLIC'S SPECTRUM V. THE NETWORKS' PROFITS

As the Commission considers the networks' request for further deregulatory relief so that they can increase their market share, the Commission must also give appropriate weight to the fact that the four major networks reach their audiences on free spectrum that is a valuable public resource.

The basic reality - that the networks' airways are, in fact, the public's spectrum - is largely overlooked as network executives and their parent companies fixate on bottom line profits and air the lowest common dominator programming on their respective prime time schedules, Profits – not providing the best and most diverse programming for the public – are thepre-eminent considerations that guide the four ranking network officials who determine what programming will air on their prime time schedules. This reality was confirmed recently by New York Times journalist Bill Carter in an extensive article quotingnetworkofficials who were "ecstatic" by the financial success of their collective decisions to focus on low budget reality shows.[58] Profits – not diverse genres of programming – dominate current network strategies.

For the 43 million U.S. consumers who are dependent on network television." this means reality programming – not dramas, sitcoms, or the lost art of movies of the week (MOW) – has become the overwhelming genre of network programming. In fact, nor are feisty females in lead roles on sitcoms in any numbers today, contrasted to the 1970s and 1980s.

Based on the current environment in network programming, the question for the Commission must be: is the Commission's fundamental goal for diversity of sources for prime time programming

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[58] See Bill Carter, Reality Shows Alter Wav TV Does Business, N.Y. Times, Jan. 25,2003, at AI.
[59] See MEDIAMARK RESEARCH, INC., FALL 2002 REPORT (2002), Copyright 2002.

being advanced or thwarted by the four major networks' unregulated freedom to program 100% of their prime time schedule wirh their own programming? Said another way in words used by the Schurz Court: based on the record before the Commission, "might"" the Commission's goals of diversity and competition in the narrow, network dominated prime time television programming marketplace. be advanced by a content neutral *25%* Independent Producer Rule that would require the networks to obtain 25% of their prime time programming from non-network sources?

In answering this quesrion, the Commission must ask what is the resulting harm to the four major networks - and what are the possible benefits to the public whose spectrum the networks are freely utilizing?

For the networks, there is no harm. They would retain 100% of their ad revenues from their entire prime time schedules; if there was a hit show like "Cosby" aired during the *25%* Independent Producer window, the networks would still reap a windfall by retaining all of the increased ad revenues generated by the winning independently produced hit. Likewise, the networks also would retain the unfettered ability to own and produce 75% of the prime time programming they air each week. Indeed, the one network which today exceeds the *25%* threshold is the most profitable of all.

For U.S. consumers. particularly the **43** million who are relegated to network broadcasting - not programming available on pay services - they will have access to new and diverse non-network sources of prime time programming at least *25%* of the time that they watch television. While the **25%** Independent Producer Rule would not dictate content, it nonetheless, would substantially increase the possibility that more diverse genres of programming will emerge for viewers outside the network's preferred audience, the 18-34 or **18-49** year old demographic groups. With the

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[60] *See* Schurz, 982 F.2d at 1049.

adoption of the 25% Independent Producer Rule, future prime time network schedules could include independently produced programming such as sitcoms like the "Golden Girls," "Murphy Brown" and "Designing Women," MOWs like "Roots" and "Decoration Day" and family viewing programs like the "Cosby Show," "Family Ties" and "Roseanne" — programming that is entertaining and socially important.

In this regard, when The New York Times' media journalist Bill Carter recently reported on the future of network programming, he asked CBS' Executive Leslie Moonves "What's the future ofscripted programs versus reality?"[61] His response: "I think people (the four network programming executives) will be ordering fewer drama pilots than they thought they would only a week ago."[62]

As Mr. Carter reponed, the networks' commitment to the single genre of low budget reality shows is all encompassing. In fact, during the remainder of the 2002-2003 season, the major networks are expected to collectively exhibit 30 new reality series, which is 20% more than the combined total of comedies and dramas.[63]

Without making any content judgments, the Commission must accept the troublesome conclusion that the currently unregulated prime time television programming marketplace is not promoting the Commission's goal of diversity of sources. It is not producingdiversegenresofprime time television. It is not giving 43 million network-only viewers diverse choices of programming aimed at senior citizens, young viewers and family viewers. It is not providing the diverse programming necessary to attract maximum advertiser support.

Instead, the four major networks — left totally unregulated — have chosen during the past

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[61] Bill Carter, Reality Shows Alter Wav TV Does Business, N.Y. Times, Jan. 25,2003, at B14.
[62] Id.
[63] See id. at A1.

several years largely to limit programming to in house or network affiliated sources. On the other hand, for the 30 years preceding the 2000-2001 season, each major network aired more than 25% of their respective prime time schedules with independently produced programming. The networks – by virtue of their free use of valuable FCC licensed spectrum — must be required to do more than address their goals for maximum corporate profits; as licensees of the public airways, the networks must be required, through the content neutral 25% Independent Producer Rule, to help advance the Commission's fundamental goal of insuring that consumers have access to as much diverse programming as possible.

## VI. CONCLUSION

In view of the Commission's longstanding commitment to diversity and competition, and based on the documentation now in the Commission's Record confirming the severe diminishment of diverse sources of prime time television programming, the Coalition for Program Diversity urges the Commission to retain the 35% national broadcast cap and the dual network rule, and to adopt the judicially sustainable, content-neutral 25% Independent Producer Rule. It is clearly in the public's interest.

Respectfully submitted,
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